Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID WHITFIELD,

Petitioner,

v.

ALABAMA SECURITIES COMMISSION and
OHIO DIVISION OF SECURITIES,

Respondents.

**On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

DAVID WHITFIELD
P.O. Box 1031
Coleman, FL 33521-1031

Petitioner

QUESTIONS PRESENTED

1. Whether the State Agency plaintiffs lacked standing in bringing suit on behalf of its citizens under *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), where the securities case was based solely on federal question?

2. Whether the religious Faith Promises Program offered by Greater Ministries International Church as a means for individuals to make donations to the Church, where petitioner was an Elder of Church constituted a security under *Securities Exchange Comm'n v. W.J. Howey Co.*, 328 U.S. 293 (1946)?

3. Whether federal court violated the *Rooker-Feldman* doctrine as well as principles of comity where the federal court overruled the Florida state courts' judgment the religious Faith Promises Program was not a "security" as a matter of law?

4. Whether the district court's refusal to grant petitioner's belated request for a jury trial, where docket sheet and Scheduling Conference Order indicated case was being tried by jury lulled petitioner to believe case was to be tried by jury, violated petitioner's Seventh Amendment right?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, DAVID WHITFIELD ("Mr. Whitfield"), respectfully prays for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on November 23, 2004.

OPINIONS BELOW

The unpublished opinion of the Eleventh Circuit Court of Appeals affirming the judgment of the United States District Court on direct appeal is reproduced in Appendix A hereto. The order denying the petition for rehearing issued by the Eleventh Circuit is reproduced in Appendix B hereto. The judgment entered by the United States District Court for the Middle District of Florida – TAMPA DIVISION, dated November 23, 2003, is reproduced in Appendix C hereto. The judgment of the Florida State district court of appeals is reproduced in Appendix D hereto.

JURISDICTION

The Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1). This petition presents this Court with a serious constitutional question as well as a conflict with decisions of this Court as more fully presented below. The questions center around whether a district court should give full faith and credit to a Florida state court judgment declaring the religious Faith Promises Program as not constituting as a security. The petition for rehearing was denied on January 28, 2005, and the instant petition is

filed timely and within the time limitation period and subsequent extension of time granted by the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTIONS: SEVENTH AMENDMENT

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF CASE

I. Procedural History.

In late 1995, the Florida state authorities filed a complaint in a Florida State circuit court, claiming GREATER MINISTRIES INTERNATIONAL CHURCH's ("GMIC" or "Church") "FAITH PROMISES PROGRAM" was a security as a matter of law, and as such, GMIC was violating the securities laws of the state and federal statutes. The circuit court entered a temporary injunction enjoining GMIC from engaging in such solicitation activities regarding the Faith Promise Program. However, on appeal, District Court of Appeals for the Second District held that such program offering was not a security and reversed the lower court's temporary injunction against GMIC. *See, Appendix D.*

On August 6, 1999, the ALABAMA SECURITIES COMMISSION ("ASC") and OHIO SECURITIES DIVISION

("OSD") (collectively referred to as "State Agency Plaintiffs" or "State Agency Commissions") filed a federal complaint against DAVID WHITFIELD ("Mr. Whitfield" or "Petitioner") and several other individuals and the Church. The State Agency Plaintiffs stated causes of action under the federal securities statutes as well as pendent state claims. The State Agency Plaintiffs also sought appointment for a receiver, injunctive and equitable relief against the church, GMIC, and its elders, Mr. Whitfield and others. The State Agency Plaintiffs also filed a motion for a preliminary injunction, and verified motion for temporary restraining order ("TRO"). At the TRO hearing of August 25, 1999, the district court below granted Plaintiffs' motion for a TRO and appointed a receiver for all property of the named defendants in this case. The State court also ruled that the Church's Faith Promises Program was a security.

The State Agency Plaintiffs' counsel served the initial complaint on an attorney who was not authorized or retained by Mr. Whitfield to accept service of process. This particular attorney, was not licensed to practice in the State of Florida, yet filed an answer to State Agency Plaintiffs' securities complaint on behalf of all of the defendants, including Mr. Whitfield, without their knowledge.

On September 27, 1999, WILLIAM SMITH, along with several other individuals filed a motion for intervention to represent a proposed class of persons who had purportedly invested money with the GMIC. The district court granted Mr. Smith's motion to intervene in the case. The intervener's complaint was filed on February 7, 2000. On April 7, 2000, two defendants, HAYWOOD and BRENDA HALL (the "Halls") filed their answer to the

intervenors' complaint. However, Mr. Whitfield, along with two other defendants, GERALD and BETTY PAYNE (the "Paynes") were never served with the intervener's complaint.

On October 16, 2002, the State Agency Plaintiffs filed a motion for summary judgment. On November 21, 2002, Defendant Whitfield moved to dismiss the complaint for lack of personal jurisdiction. He also filed a response in opposition to the State Agency Plaintiffs' summary judgment motion. The district court denied all of the heretofore described motions filed by the parties.

On January 6, 2003, the interveners moved to have the case certified as a class action. On January 22, 2003, Mr. Whitfield requested a trial by jury, which was denied by the court as untimely. On February 4, 2003, a bench trial was had on the merits of the Plaintiffs' and intervener's complaint – a trial which lasted four days. On March 10, 2003, the Securities Commissions filed a motion seeking an assignment of liability among all of the defendants, including Mr. Whitfield. Mr. Whitfield filed a response in opposition to the aforementioned motion.

On July 11, 2003, the trial court issued an order granting the motion for class certification and the motion for assignment of liability, and entered judgment in favor of the Plaintiffs and against all defendants, including Mr. Whitfield in an amount of approximately $51 million. The State Agency Plaintiffs later filed a motion to amend the final judgment insofar that the judgment did not impose any liability upon GREATER MINISTRIES INTERNATIONAL, INC. ("GMII") given GMII was in federal bankruptcy. The court granted the motion and amended the order to reflect same.

On November 23, 2004, the Eleventh Circuit, by an unpublished opinion, affirmed the judgment of the district court as to Mr. Whitfield. On January 28, 2005, the Appellate court denied the petition for rehearing. *Appendix B.* The instant petition followed.

II. Statement of Facts.

In 1996, Mr. Whitfield was an elder of the GMIC, a bonafide Christian Church, and otherwise participated in the "FAITH PROMISES PROGRAM," which solicited "gifts" or "donations" for GMIC. The Church and its elders distributed informational pamphlets, and provided a donation form to be signed and completed by any person desiring to participate in the Faith Promises Program. This form stated in pertinent parts:

> Dear Ones,
>
> It is my desire to give a donation to the Greater Ministries International Church at 715 East Bird Street Suite 402, in Tampa, Florida 33604.
>
> As a person donating into the Ministry of the Lord Jesus Christ, I realize that there are no guarantees implied and the only promise involved is the promise God gives in His word.
>
> It is my belief that Luke 6:38 teaches "Give, and it shall be given unto you; good measure, pressed down and shaken together, and running over, shall men give into your bosom. For with the same measure that ye mete (give) withal it shall be measured to you again."
>
> I accept the teachings of Jesus Christ in Luke 6:38 and believe that God will prosper His

> Church and I am acting in faith that I will receive in the manner and spirit I am giving.
>
> I believe the donation I am giving will be used in the ministry to do the works the original church was designed to do. I believe that Lord's promises are in force in this ministry and He is able to keep His promises.
>
> My total donation of $ _____ is given freely and is to be divided into amounts of: $ _____ to be used as God leads.

See, Appendix E hereto. The above described form had a plain and obvious disclaimer to the donor: "*Greater Ministries'* Gifting Program is not an investment program. It is not a stock, bond or security. It makes no guarantee of any kind, implied or expressed. The only promises that exist are made by the Lord Jesus Himself in Luke 6:38. Matthew 25:14-29 is the biblical teaching if the doubling of one's talents." *Id.*

The responses to GMIC's solicitation for "donations" or "gifts" were overwhelming as the church received over $500 million in donations from 1996 through 1999.

In 1996, the State of Florida and its officials claimed that the Church's Faith Promises Program and its donation formation were nothing more than a security, to which the state authorities were entitled to a TRO against GMIC and its elders from engaging in such security activities without the appropriate licenses issued by the state. The circuit court granted the TRO, however, the court of appeals in 1997 reversed the circuit court's issuance of the TRO, holding:

> To determine the character of the "Faith Promises" agreement, it is necessary to look beyond

> chapter 517 to a broader definition of a security as found in case law. The most widely-accepted definition of a security is found in *Securities & Exchange Comm'n v. W.J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100 (1946). There, the court set forth the following facts to determine whether an investment is a security: (1) an investment of money, (2) in a common enterprise, and (3) an expectation of profits to be derived solely from the efforts of another. 328 U.S. at 298-99. This court has adopted the *Howey* criteria. See, *Farag v. National Databank Subscriptions, Inc.*, 448 So.2d 1098 (Fla. 2nd DCA 1984); *Adams v. State*, 443 So.2d 1003 (Fla. 2nd DCA 1983), *review denied*, 449 So.2d 265 (Fla. 1984). In applying these criteria to the "Faith Promises" pledge agreement, we determine that it is not a security. n.1 The offending schedule of repayment found in the preceding two programs has been deleted. In this document, Greater Ministries makes no promise, express or implied, that it will make any payment to the donor. The "Faith promises" agreement shifts any supposed "expectation of profits" from Greater Ministries to a supreme deity. We, therefore, reverse the temporary injunction as it applies to the "Faith promises" pledge agreement and remand. . . .

Florida v. Greater Ministries International, Inc., 689 So.2d 328, 329-330 (Fla. 2nd DCA 1997).

Following the state appellate court's aforementioned decision, and in July, 1998, GMIC's ability to fund the Faith Promises Program was severely compromised when it lost $20 million in deposits with the failure of its depository bank, Best Bank. Those individuals who "gifted" money to GMIC and had an expectation of monetary return on the "gift" to the church, began complaining to

GMIC. In an effort to reassure these individuals, GMIC issued receipts for donors to use to redeem for gold, coins or money at GMIC's storehouse, and also gave cash.

The State Agency Plaintiffs brought a federal securities lawsuit against GMIC, Mr. Whitfield and others, alleging, *inter alia*, the "Faith Promises Program" was nothing more than a fraudulent securities scheme, resulting in losses sustained by donors in an unspecified amount – under the doctrine of *parens patriae,* the State Agency Plaintiffs were seeking injunctive relief, disgorgement and restitution. For reasons unknown to Mr. Whitfield, the State Agency Plaintiffs delivered a copy of the summons and complaint to an attorney who later filed an answer on behalf of all defendants, including Mr. Whitfield. Mr. Whitfield, after the time had expired to serve him with process in the case below, filed a motion to dismiss the case for lack of personal jurisdiction, citing the very lack of service of process as the grounds for dismissal. Mr. Whitfield clearly demonstrated, and it was later undisputed, that the attorney who filed the answer on Mr. Whitfield's behalf was not his attorney nor had authorization to do so. Nonetheless, the district court denied Mr. Whitfield's motion to dismiss. Having lost that effort, and not aware of the intervenors' complaint, Mr. Whitfield was informed by the clerk of the district court, in July, 2002, that the civil case had been set for a "JURY TRIAL." for February 3, 2003. Further, Mr. Whitfield, after obtaining a copy of the case management report entered in the case as well as the dockets sheet, confirmed the clerk's notification; that is a "JURY TRIAL" had been "DEMANDED."

Thereafter, Mr. Whitfield submitted numerous motions to the court, e.g., motion for the court to order his appearance at trial from the federal prison, responses to various motions by the Plaintiffs, etc. On January 23,

2003, after being informed by the trial judge that the case was mistakenly labeled as a case for "JURY TRIAL," notwithstanding it was scheduled that way by the court, filed a motion for a jury trial, citing his Seventh Amendment right. The trial judge denied Mr. Whitfield's request heretofore described. The bench trial followed where at the close of the evidence, the trial judge entered judgment in favor of the Plaintiffs and against Mr. Whitfield and his co-defendants. In so doing, the district court adopted State Agency Plaintiffs determination of losses of $51 million.

On appeal, Mr. Whitfield claimed, among other things, that: (1) the Faith Promises Program was not a "security" as a matter of law; (2) the district court's failure to give full faith and credit to the state court's determination that the Faith Promises Program was not a security was error; (3) the district court's refusal to allow Mr. Whitfield a jury trial and otherwise to exercise his Seventh Amendment right was error; and (4) the Securities Commissions lacked standing to sue on behalf of individuals or third parties. The Eleventh Circuit rejected each of his points of error attributable to the district court below. This appeal followed.

REASONS FOR GRANTING THE PETITION

The Petitioner, Mr. Whitfield, respectfully submits that the Eleventh Circuit's erred holding that (1) the State Agency Plaintiffs had standing to bring the lawsuit on behalf of its citizens against Mr. Whitfield; (2) the religious donation program known as "Faith Promises Program" offered by GMIC was a security; (3) the Florida State appellate court's judgment that the Faith Promises

Program was not a security was properly overruled or otherwise ignored by the district court below; (4) the donation program, known as Faith Promises Program, administered by the Elders and others by and through the Church, was a security; and (5) the district court's refusal to grant Mr. Whitfield's request for a jury trial was not a violation of his Seventh Amendment right under the U.S. Constitution. Given the Eleventh Circuit's judgment in the case *sub judice* is in direct conflict with the decisions of this Court, *see, Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), *Securities Exchange Comm'n v. W.J. Howey Co.*, 328 U.S. 293 (1946), and the *Rooker-Feldman* doctrine, this Court should grant the instant petition and reach the merits of the appeal as more fully argued below. Further, the trial judge's refusal to allow Mr. Whitfield to exercise and otherwise enjoy his Seventh Amendment right to a jury trial, warrants review by this Court, or so Mr. Whitfield respectfully opines.

THE STATE AGENCY PLAINTIFFS DID NOT HAVE STANDING TO BRING SECURITIES SUIT ON BEHALF OF ITS CITIZENS.

As an initial matter, this Court will consider the question of standing under Article III, notwithstanding a lack of clarity over whether the standing challenge was pressed in the Court of Appeals, since the jurisdiction of this Court to decide the case is implicated. *See, Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555 (1977). Having said that, the State Agency Plaintiffs claimed to have standing to bring the securities fraud case on behalf of its citizens under the Securities Act of 1933 and Securities Exchange Act of

1934, codified under Title 15 U.S.C. §§ 77 and 78 (collectively referred to as the "Act"). The district court below agreed and so too the Eleventh Circuit. While the Eleventh Circuit noted that the Act conferred the district court with subject matter jurisdiction over the State Agency Plaintiffs' federal claims, the appellate court chose to ignore or otherwise fail to apply the strictures under *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). In *Hawaii*, this Court stated:

> We note in passing the State's claim that the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and thus that denying Hawaii the right to sue for injury to her quasi-sovereign interests will allow antitrust violations to go virtually unremedied. Private citizens are not powerless, however, as the State suggests.
>
> Congress has given private citizens rights of actions for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U.S.C. § 1337; 15 U.S.C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.

Hawaii, 405 U.S. at 194-95. In other terms, where Congress has specifically provided a vehicle by which a citizen of a particular State can recover his or her damages or bring suit against a wrongdoer pursuant to a federal statute, then a State lacks standing to sue on behalf of its citizens where the effort is to recover the State's citizens' injuries or losses. Here, the State Agency Plaintiffs' citizens who made the donations to the Faith Promises

Program had a federal avenue to recover any purported loss from Mr. Whitfield. *See, Dabit v. Merrill Lynch, Pierce, Fenner,* 395 F.3d 25, 26 (2nd Cir. 2005) ("Private litigant has standing to bring action under Rule 10b-5 only when he is himself purchaser or seller of securities in question"); *see also, Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 95 S.Ct. 1917 (1975) ("plaintiffs were not entitled to sue for violation of Rule 10b-5, since they neither purchased nor sold any of the offered shares.").

This Court's analytical framework for resolving standing issues is comprised of constitutional and prudential requirements. *Warth v. Seldin,* 422 U.S. 490, 498-99, 95 S.Ct. 2197 (1975). The constitutional requirements derive from Article III's limitation of federal jurisdiction to situations where a justiciable "case or controversy exists" between the litigants. *Id.* at 498. There are three "prudential" considerations, one of which considers whether the plaintiff is asserting his legal rights and interests rather than the legal rights and interests of third parties. This third consideration is the general prohibition against third party standing. This prohibition promotes the fundamental purpose of the standing requirement by ensuring that the courts hear only concrete disputes between the interested litigants who will frame the issues properly. *See, Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 220-21, 94 S.Ct. 2925, 2932 (1974).

A litigant must assert his own legal rights and interests and may not ordinarily rely on the rights of third parties. *Id.* The prohibition against third-party standing promotes the fundamental purpose of the standing requirement by ensuring that the courts hear only concrete disputes between interested litigants who will frame the issues properly. *Id.* An individual may be excepted from

the rule prohibiting third-party standing. *In Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364 (1991), this Court characterized the third-party standing inquiry as follows:

> We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: the litigant must have suffered an "injury-in-fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exit some hindrance to the third party's ability to protect his or her own interests.

Id. at 409-412, 111 S.Ct. 1370-71 (citations omitted). Given this background of clearly established law, "[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of rights of third parties not parties to the litigation." *Singleton v. Wulff,* 428 U.S. 106, 113, 96 S.Ct. 2868 (1976).

While a party may not ordinarily claim standing to vindicate the constitutional rights of some third party, this is a prudential, rather than jurisdictional, rule of practice. The rule has been related in cases where a plaintiff alleging his own injury is asserting "concomitant rights of third parties that would be 'diluted or adversely affected' should [his] constitutional challenge fail." *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451 (1976) (allowing saloon keeper suffering economic injury to raise equal protection rights to young men to buy beer at the same age as women); *see also, Carey v. Population Servs. Int'l,* 431 U.S. 678, 97 S.Ct. 2010 (1977) (allowing corporate seller of contraceptives to challenge state statute prohibiting sale of contraceptives to persons under 16 years old); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571 (1925) (allowing a

private and a parochial school to assert constitutional rights of parents and guardians to direct the upbringing and education of their children).

To put it another way, this Court has looked primarily to two factual elements to determine whether the rule against asserting the rights of third parties should apply in a particular case:

> The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.

Singleton, 428 U.S. at 115, 96 S.Ct. at 2874.

What all this means is simply this – for the State Agency Plaintiffs to have standing to bring the federal securities case on behalf of the citizens of their respective State, the State Agency Plaintiffs must have made donations via the Faith Promises Program offered by Mr. Whitfield and others on behalf of the Church. *Blue Chip Stamps,* 421 U.S. at 723, 95 S.Ct. 1917. But the State Agency Plaintiffs did not make any donations or participate in the aforementioned donation program offered by the Church. Further, the State Agency Plaintiffs were not a "person" under the Act given they made no donations to GMIC. Since the State Agency Plaintiffs were not entitled to sue under the Act under the unique circumstances of

the instant case, they could not maintain this class action lawsuit in the first instance. *See, O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669 (1974) (held if none of the named parties purporting to represent a class in a federal court action establishes the requisite under Article III of a case or controversy with the defendant, none may seek relief on behalf of himself or any other member of the class); *Hunt v. Washington State Apple Advertising Com.,* 432 U.S. 333, 97 S.Ct. 2434 (1977) (same); *Slack v. Stiner,* 358 F.2d 65, 70 (5th Cir. 1966) ("the action could be maintained by the original plaintiffs as a class suit only if they were members of the class they sought to represent Anderson and Stiner, being underwriters and dealers are not members of the class entitled to recover and hence they cannot maintain a class action.").

Based on the foregoing, it is evident that the State Agency Plaintiffs lacked standing to bring the federal securities class action lawsuit against Mr. Whitfield in the first instance, requiring this Court to reverse the judgment of the appellate court and remand with instructions to dismiss the case, or so Mr. Whitfield respectfully opines.

THE RELIGIOUS FAITH PROMISES PROGRAM OFFERED BY GMIC WAS NOT A SECURITY UNDER TITLE 15 U.S.C. § 77b(a)(1).

The Eleventh Circuit held that the Faith Promises Program offered by the GMIC and its Elders was a security under federal law. In so doing, the appellate court below, in applying the *Howey* test established by this Court, held:

> We find no error in the district court IS determination that the Program was a security because: (1) investors in the Program provided GMIC with money through couriers or direct mailings; (2) their money was tied to the efforts of others, and they relied on the efforts of others to deliver a 10% return of their money and double their initial investment; (3) the GMIC marketed the Program by promising a return and sharing success stories of those who had joined the Program.

Appendix A. In reaching this legal conclusion, the Eleventh Circuit focused on "three elements: (1) an investment of money, (2) a common enterprise, and (3) the expectation of profits to be derived solely from the efforts of others." *Id.*

Applying this *Howey* test on the very same facts here, the Florida State District Court of Appeals for the Second District reached a completely opposite result; that is, the state appellate court held as matter of law that the Faith Promises Program was not a security under either state or federal law. The State appellate court held:

> The offending schedule of repayment found in the preceding two programs has been deleted. In this document, Greater Ministries makes no promise, express or implied, that it will make any payment to the donor. The "Faith promises" agreement shifts any supposed "expectation of profits" from Greater Ministries to a supreme deity. We, therefore, reverse the temporary injunction as it applies to the "Faith promises" pledge agreement and remand . . .

Florida v. Greater Ministries International, Inc., 689 So.2d at 330; *Appendix D.* In other terms, the State appellate court concluded that the third element or inquiry under *Howey* clearly did not envision that the "expectation of

profits" from the efforts of God or the Lord, as perceived by or represented to the donors under the Faith Promises Program, fit within the definition or term of "efforts of others" under the Act.

By its terms, *Howey* requires profits be generated "solely" from the efforts of others. 328 U.S. at 298, 66 S.Ct. 1102-03. Although the lower courts have given this Court's definition of a security broader sweep by requiring that profits be generated only "predominately" from the efforts of others, *see, e.g., SEC v. International Loan Network, Inc.,* 968 F.2d 1304, 1308 (D.C. Cir. 1992); *Goodman v. Epstein,* 582 F.2d 388, 408 n.59 (7th Cir. 1978), they have never suggested that purely ministerial or clerical or higher deity functions are by themselves sufficient; indeed, quite the opposite is true. *See, e.g., SEC v. Koscot Interplanetary, Inc.,* 497 F.2d 473, 483 (5th Cir. 1974); *SEC v. Glenn W. Turner Enterprises, Inc.,* 474 F.2d 476, 482 (9th Cir. 1973).

Notwithstanding the district court should have deferred to the Florida state court judgments on the issue of whether the Faith Promises Program was a security under the *Howey* test, the indisputable fact that the donors participating in the Faith Promises Program expected that their Lord's or God's efforts in said religious donation program would generate "return profits" following their donations plainly speaks volumes as to why the Faith Promises Program did not constitute as a security under the Act. Additionally, the record clearly shows and no one disputes that each donor signing the "Faith promises" pledge form admitted that they were making donations to the Church. Each donor acknowledged, by signing the pledge form, that this was not an investment, but, rather a charitable "gift." Under *Howey,* this Court

has made it a requirement that for the plaintiff to have standing to sue, he or she must have "purchased" or "sold" a security. Here, all that was done was citizens of each of the State Agency Plaintiffs made donations with the expectations that the Lord or God will bless them with "gifts" back, of course larger than what was initially given.

For the reasons stated above, and when reviewing the donation form appended hereto, it should be axiomatic that the Faith Promises Program – a religious donation program premised on an expectation of a higher deity's efforts in causing a return or "profits" on said donation – is not a security based on the clearly established law created by this Court. Mr. Whitfield respectfully submits that the Eleventh Circuit erred in its *Howey* analysis in reaching that the Faith Promises Program was a security, requiring this Court to vacate the judgment of the Eleventh Circuit and remand the case with instructions that it be dismissed.

FEDERAL COURT VIOLATED THE *ROOKER-FELDMAN* DOCTRINE AS WELL AS PRINCIPLES OF COMITY WHERE THE FEDERAL COURT OVERRULED THE FLORIDA STATE APPELLATE COURT'S JUDGMENT THAT THE RELIGIOUS FAITH PROMISES PROGRAM WAS NOT A SECURITY AS A MATTER OF LAW.

Before the commencement of the federal securities lawsuit by the State Agency Plaintiffs, the State of Florida filed a complaint in the Florida state circuit court, seeking to restrain or enjoin Greater Ministries and its Directors from offering its gift exchange Programs to the citizens of the state of Florida and elsewhere. The State of Florida

claimed, as did the State Agency Plaintiffs here, that the Faith Promises Program is a security under state and federal law when applying the *Howey* test established by this Court. The state circuit court concluded that said donation program was in fact a security and subject to the regulations of the state and federal securities laws. On appeal, the Florida District Court of Appeals held that when applying the *Howey* test, the Faith Promises Program was not a security. *Appendix D.* The Florida Supreme Court denied the State of Florida's request for certiorari review. The State of Florida elected not to seek further review from this Court.

Thereafter, the State Agency Plaintiffs' filed the federal securities complaint, alleging, *inter alia,* that the Faith Promises Program was an unregistered security. The district court refused to recognize the decision of the Florida District Court of Appeals that the aforementioned donation program was not a security. On appeal, the Eleventh Circuit sided with the district court on this issue and simply ignored the Florida state court judgment. Mr. Whitfield submits that the Florida state appellate court judgment and subsequent circuit court judgment on remand should have been given full faith and credit in the instant case by both the district court and appellate court below.

Under the *Rooker-Feldman* doctrine, federal district courts lack jurisdiction to review the final judgment of state courts. *See, Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 644 n.3, 122 S.Ct. 1753, 1759 n.3 (2002) *citing, D.C. Court of Appeals v. Feldman,* 460 U.S. 462, 476-82, 103 S.Ct. 1303, 1311-15 (1983) and *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415-16, 44 S.Ct. 149, 150 (1923). The doctrine applies where "(1) the party in federal

court is the same as the party in state court; (2) the prior state court ruling was a final or conclusive judgment on the merits; (3) the party seeking relief in federal court had a reasonable opportunity to raise its federal claims in the state court proceeding; and (4) the issue before the federal court was either adjudicated by the state court proceeding or was inextricably intertwined with the state court's judgment." *Amos v. Glynn County Bd. of Tax Assessors,* 347 F.3d 1249, 1265 n.11 (11th Cir. 2003) (internal citations omitted). There is an exception that exists to the *Rooker-Feldman* doctrine; when a federal statute authorizes federal appellate review of final state court decisions. *See, Dale v. Moore,* 121 F.3d 627, 634 (11th Cir. 1997). Under the federal securities statutes, there are no provisions which provide an independent source of federal jurisdiction as to fall within this exception. Cf., *e.g., Hanson v. Office of Prof'l Med. Conduct,* 314 F.Supp.2d 241, 248 (S.D.N.Y. 2004) (applying *Rooker-Feldman* to bar claims brought under the Rehabilitation Act).

In the case *sub judice,* the State of Florida, on behalf of its citizens and those residing outside the state, commenced a lawsuit in the state circuit court against Greater Ministries and its Directors, seeking, among other things to have the Faith Promises Program declared a "security" and recover the individuals' monies given under the religious donation program. When the State of Florida failed, the State of Alabama and Ohio stepped up to the judicial plate and filed the federal securities class action below. These two sovereigns had been monitoring the progress of the state case filed by the State of Florida. Both Alabama and Ohio, while watching for the outcome of the Florida state case, had every opportunity to join the State of Florida in the state lawsuit.

However, Ohio and Alabama did not do so, but, rather allowed the State of Florida, as their privy, to fight for relief and damages on behalf of all individuals, including those in Ohio and Alabama, who had donated money under the Faith Promises Program. When the State of Florida lost the case, that is, when the Florida state courts held, after an exhaustive appellate review, that the Faith Promises Program was not a security, the State Agency Plaintiffs ran to federal court. There, they convinced the district court below to disregard the state courts' judgment on the issue of security. On appeal, the Eleventh Circuit agreed with the district court below.

Mr. Whitfield respectfully submits that the state courts' determination that the Faith Promises Program was not a security as a matter of law should have been respected in the case below by the district court and the Eleventh Circuit. *See, Mills v. Harmon Law Offices, P.C.*, 344 F.3d 42, 43 (1st Cir. 2003) ("In a practical sense, full faith and credit establishes a rule of evidence requiring recognition of a prior out-of-state judgment, giving it *res judicata* effect and thus avoiding relitigation of issues on one state which have already been decided in another."); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645 (1979) ("Under the doctrine of *res judicata,* a judgment on the merits in a prior suit bars a second suit involving the same parties or their *privies* based on the same cause of action[.]"). Failing to do so requires this Court to vacate the Eleventh Circuit's judgment to the contrary and remand with instructions that the state courts' determination as to the issue of whether the aforementioned donation program constitutes a security, or so Mr. Whitfield respectfully opines.

THE DISTRICT COURT ERRED IN REFUSING TO GRANT MR. WHITFIELD'S REQUEST FOR A JURY TRIAL.

During the course of the proceedings, the docket sheet maintained by the district court clerk clearly reflected that the state Agency Plaintiffs demanded a jury trial. Additionally, the Scheduling Order and Case Management Report entered by the district court below plainly stated that the case was set for a jury trial for February, 2003. In light of the foregoing representations during the course of the trial proceedings, Mr. Whitfield reasonably relied on said representations by the clerk and district court, thereby obviating the need for Mr. Whitfield to make the very same demand for a jury trial. It was not until a few weeks before the case was to be tried, did Mr. Whitfield learn from a pretrial conference that the entries by the clerk and district court were a mistake. The district court told Mr. Whitfield that the case was being tried by the district judge. Without delay, Mr. Whitfield filed a motion for the case to be tried by a jury of his peers pursuant to his Seventh Amendment right to the U.S. Constitution. The district court refused, citing the jury demand made by Mr. Whitfield was untimely.

On appeal, the Eleventh Circuit opined that: "Whitfield's reliance on the docket entry dated July 2002 does not explain why he failed to file a motion for a jury trial more than three years after the law suit commenced; (2) Whitfield filed his motion one week before the trial was to begin, meaning that his late request was 'likely to disrupt the court's schedule and cause great prejudice,'" and "(3) the court's involvement in the case since 1999 suggests that the court was familiar with the facts and would be able to decide the issues efficiently." *Appendix A.* However,

as noted by the appellate court below in footnote 2 of its opinion, the case management order stated: "This case is set for **JURY TRIAL ...** " It is for this very reason, coupled with the initial notation on the docket sheet when the instant case commenced below that Mr. Whitfield was lulled into believing the State Agency Plaintiffs had demanded a jury trial.

Given Mr. Whitfield's *pro se* appearance throughout the case, the fact he never was personally served with process on the original and subsequent amended complaints, and the basis for his belated request for a jury trial, the district court should have allowed Mr. Whitfield at least some leeway. *See, Parrott v. Wilson,* 707 F.2d 1262, 1267 (11th Cir. 1983) ("when reviewing a lower court's denial of a belated jury request our cases require the appellate courts give considerable weight to the movant's excuse for failing to make a timely jury request.").

Notwithstanding the above, there is no dispute that the State Agency Plaintiffs' federal civil securities claim for damages is a legal dispute, entitling Mr. Whitfield to a jury fact-finder under the Seventh Amendment. *See, e.g., Curtis v. Loether,* 415 U.S. 189, 193-95, 94 S.Ct. 1005 (1974). The Seventh Amendment right to a civil jury is not absolute and may be waived if the request for a jury was not timely. *See, General Tire & Rubber Co. v. Watkins,* 331 F.2d 192, 197 (4th Cir.), *cert. denied,* 377 U.S. 952, 84 S.Ct. 1629 (1964). Because the right to a jury trial is fundamental, "courts must indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 393, 57 S. Ct. 809, 811-12 (1937).

The procedure for determining the timeliness of a party's jury demand is contained in Federal Rule of Civil

Procedure 38, which states that "[t]he failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury." Fed.R.Civ.P. 38(d). A party makes a timely demand:

> by (1) serving upon the parties a demand thereof in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d).

Fed.R.Civ.P. 38(b). Where the defendant, like Mr. Whitfield, makes a belated jury request, Fed.R.Civ.P. 39(b) authorizes a district court to grant such request in its discretion. *Malbon v. Pa. Millers Mut. Ins. Co.*, 636 F.2d 936, 940 (4th Cir. 1980). The federal courts appear to be unified in identifying several relevant considerations: (1) whether the issues are more appropriate for determination by a jury or a judge (i.e., factual versus legal, legal versus equitable, simple versus complex); (2) any prejudice that granting a jury trial would cause the opposing party; (3) the timing of the motion (early or late in the proceedings); (4) any effect a jury trial would have on the court's docket and the orderly administration of justice. *Malbon*, 636 F.2d at 940 n.11 (internal citations omitted). Other federal courts have included a fifth factor: "the reason for the failure to make a timely demand." *Wright Mfg. Inc. v. Great Dane Power Equip., Inc.*, 45 U.S.P.Q.2d 1543, 1998 WL 105470 (D.Md. 1998); *see also, e.g., Farias v. Bexar County Bd. of Trustees Mental Health Retardation Servs.*, 925 F.2d 866, 873 (5th Cir. 1991); *Vannoy v. Cooper*, 872 F.Supp. 1485, 1487 (E.D. Va. 1995).

"A jury trial is not substantially more burdensome than a bench trial for the court and the parties, although

in considering the impact of the court's calendar it is necessary to contemplate not only the effect of the delay in the particular case at hand, but also 'the effect of routinely granting such motions on the overall effectiveness of the court's docketing system[.]'" *A Helping Hand, LLC v. Baltimore County, Md.,* 295 F.Supp.2d 585, 589 (D.Md. 2003) (internal citations omitted). "But juries are not bound by what seems inescapable logic to judges." *Morissette v. United States,* 342 U.S. 246, 276, 72 S.Ct. 240, 256 (1952).

And, for this very reason, where Mr. Whitfield was lulled into believing from the very outset of the civil case below that a jury demand was made by the parties, it should be axiomatic that the district court below abused its discretion by denying the belated request for a jury trial.

The State Agency Plaintiffs did not complain about the belated jury trial request by Mr. Whitfield. Nor did the State Agency Plaintiffs move to correct the erroneous entries of regarding the jury demand. Rather, the district court simply chose to override Mr. Whitfield's constitutional right to have a jury of his peers decide the outcome of the factual controversy. *See, Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 510, 79 S.Ct. 948 (1959) ("[A] court's discretion [to deny a jury trial] is very narrowly limited and must, whenever possible, be exercised to preserve jury trial."); *Guajardo v. Estelle,* 580 F.2d 748 (5th Cir. 1978) (even if a party has waived its right to a trial by jury, that right may be revived, at least as to newly asserted claims, upon the filing of an amended complaint which raises new issues).

In order to vindicate his Seventh Amendment right to a jury trial in this civil case, Mr. Whitfield respectfully submits this Court should vacate the decision of the Eleventh Circuit affirming the district court's judgment on this issue.

CONCLUSION

WHEREFORE, the Petitioner, DAVID WHITFIELD requests this Court to grant the instant petition for writ of certiorari, vacate the judgment of the Eleventh Circuit, and remand the case with instructions to dismiss same. Mr. Whitfield requests other and further relief this Court deems proper and just.

Respectfully submitted,

DAVID WHITFIELD
P.O. Box 1031
Coleman, FL 33521-1031

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-13776

Non-Argument Calendar

D. C. Docket No. 99-01786-CV-T-30-MSS

ALABAMA SECURITIES COMMISSION,
OHIO DIVISION OF SECURITIES,

Plaintiffs-Counter
Defendants-Appellees,

WILLIAM C. SMITH, on behalf of
themselves and all persons
similarly situated, et al.,

Intervenor-Plaintiffs,

versus

GREATER MINISTRIES
INTERNATIONAL, INC., et al.,

Defendants-Counter
Claimants,

GERALD PAYNE,
HAYWOOD EUDON HALL,
a.k.a. Don Hall, et al.,

Defendants-Counter
Claimants-Appellants,

WILLIAM F. HEASTON, et al.,

Intervenor-Defendants.

No. 03-15919

Non-Argument Calendar

D. C. Docket No. 99-01786-CV-30MSS

ALABAMA SECURITIES COMMISSION,
OHIO DIVISION OF SECURITIES,

Plaintiffs-Counter
Defendants-Appellees,

WILLIAM C. SMITH, on behalf of
themselves and all persons
similarly situated, et al.,

Intervenor-Plaintiffs,

versus

GREATER MINISTRIES
INTERNATIONAL, INC., et al.,

Defendants-Counter
Claimants,

DAVID WHITFIELD,

Defendant-Counter
Claimant-Appellant,

WILLIAM F. HEASTON, et al.,

Intervenor-Defendants.

Appeals from the United States District Court
for the Middle District of Florida

(November 23, 2004)

Before TJOFLAT, BIRCH and BARKETT, Circuit Judges.

PER CURIAM:

In these consolidated appeals, Brenda Hall, Haywood Hall, Gerald Payne, Patrick Talbert, and David Whitfield appeal the district court's judgment in favor of the Alabama Securities Commission ("ASC") and the Ohio Department of Securities ("ODS"), pursuant to 15 U.S.C. §§ 77a, 78a *et seq.*, Ala. Code 8-6-1 *et seq.* and Oh. Rev. Code 1707.01 *et seq.* Whitfield also appeals the district court's denial of his post-judgment motions filed under Fed. R. Civ. P. 59(e) and 60(b).

On August 5, 1999, the ASC and ODS (collectively "plaintiffs") acting on behalf of the citizens of their respective states brought a securities fraud suit against Greater Ministries International, Inc., which later became known as Greater Ministries International Church ("GMIC")[1] and the elders of GMIC whom the ASC and ODS identified as Haywood Hall, Gerald Payne, Patrick Talbert, and *David Whitfield* (collectively "defendants"), among others. Specifically, plaintiffs alleged that: (1) defendants sold unregistered securities through unlicensed brokers by inducing investors to buy securities with promises of profits on their investments; (2) defendants' scheme, which ultimately became known as the "Faith Promises Program," constituted securities fraud because defendants represented to investors that their investment interest, referred to as a "gift" or "gift-in," would turn into a profit or "blessing,"; (3) to induce investors to buy, the unlicensed brokers would

[1] The district court dismissed without prejudice GMIC as a defendant because a bankruptcy case had been brought on behalf of GMIC and that action was pending.

claim that GMIC owned gold and diamond mines and that their investment would double; (4) defendants attempted to conceal the plan as an investment scheme; and (5) the scheme had the following investment characteristics: (a) the "blessings" were paid according to a regular schedule, (b) the GMIC overseas programs were touted as profitable during sales presentations, and (c) profits were expected from the "gifts."

After plaintiffs filed suit, the district court granted their application for a temporary restraining order ("TRO"), prohibiting the operation of the Faith Promises Program (the "Program"). Also, the court placed GMIC into federal receivership, and the federal receiver, with the court's authorization, initiated an involuntary bankruptcy proceeding against GMIC. Upon the motion of defendants' attorney, Albert Cunningham, the court consolidated plaintiffs' application for a preliminary injunction with plaintiffs' application for a permanent injunction, and held a trial on the merits. At the conclusion of the trial at which Cunningham represented defendants, the district court concluded that the Program constituted a securities program under *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-99, 66 S.Ct. 1100, 1103, 90 L.Ed. 1244 (1946), and that it could be regulated by the state despite its claimed religious underpinnings. It therefore granted plaintiffs the permanent injunction they sought.

After the court entered the injunction, the following took place. First, William Smith and six other investor plaintiffs (collectively "investor plaintiffs") filed a motion to intervene and to be certified as a class, pursuant to Fed. R. Civ. P. 23(a), (b)(1), and (b)(2). Second, Whitfield, in a "Declaration of Truth," demanded that he be dismissed from the case because: (1) he was not a party to the case;

(2) no one ever sent him any of the documents filed in the proceeding; (3) he did not retain Albert Cunningham to represent him; and (4) he had not been served with process. Third, Albert Cunningham moved the court for leave to withdraw as defense counsel, stating that: (1), [h]e was the attorney for Payne and GMIC; and (2) he agreed to represent the common interests of other named defendants and the class of defendants named as Elders "under the umbrella of the limited defense entered for the Church," but had no individual contract with named defendants (other than Payne).

In a case management and scheduling order (the "scheduling order"), the court set a September 30, 2002, deadline for the completion of discovery and the filing of motions, and a trial date of February 3, 2003.[2] Both before and after the discovery deadline, Whitfield submitted interrogatories and requests for documents from the bankruptcy trustee and the receiver, which the court either denied or allowed the receiver and the trustee to ignore by granting their motions for protective orders.

Despite the case scheduling order which stated that the case would be tried to a jury, the court determined during a pre-trial conference that because no party had demanded a jury trial, the case would be tried to the court. On January 23, 2003, Whitfield moved the court to provide for his transportation to the courthouse (for the trial)[3] and

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[2] The case management order stated: "This case is set for **JURY TRIAL** in Courtroom 13A of the United States Courthouse, 801 N. Florida Avenue, Tampa, Florida, during the ***FEBRUARY 3, 2003***, trial term before the Honorable James S. Moody, Jr."

[3] Meanwhile, Whitfield, Payne, Talbert, and Haywood Hall had been convicted of mail fraud and imprisoned.

demanded a jury trial. The court rejected the jury-trial demand, explaining that the request was untimely and the jury trial entry in the scheduling order was a result of the clerk office's error.

Whitfield, appearing *pro se*, was the only defendant present when the trial began. The evidence presented against him and the other defendants established the following. Investors were promised that they would typically receive a 10% return on their "donations" each month, which would double their investment in sixteen months. They were told (1) to write "gift" on their donation checks and (2) to avoid using the "I" word, which one investor interpreted to refer to "investment." Although they were informed of GMIC's investments in gold and diamond mines and overseas trading, plaintiffs' investigators found no evidence of mining activity or overseas trading. Whitfield, who was an elder in the GMIC and began working full time for GMIC in 1996, created a courier service to provide a way for investors to return their monthly "gifts" to the Program. As an elder, Whitfield received "gas money," which turned out to be 5% of the amount of any donations that he was responsible for obtaining. Elders were specifically advised against informing potential investors that they received any money for seeking donations.

In July 1998, Best Bank, GMIC's depository bank for the Program, crashed, leading GMIC to lose approximately $20 million in deposits. Because of the bank's failure, GMIC suspended payments from the Program in October 1998 although it reassured those who inquired that the Program remained vital. Instead of monetary payments, GMIC issued certificates for donors to use to redeem for gold, coins, or money at its storehouse. Because GMIC was

no longer paying individual investors, the bankruptcy trustee indicated that approximately 3,800 valid donor-creditors had suffered losses of about $51 million.

Brenda Hall's involvement in the scheme consisted of her presence at meetings in which her husband gave sales pitches for the Program, her attendance at elders' meetings where she sat at the front of the room, her association with the Christian Courier Service, which received letters inquiring about when investors would receive their "gifts." During one meeting, Don Hall stated: "Sister Hall, goin' behind the counter there that's my wife, she'll be sittin' over here at the table, and if you want to get in [i.e., invest] tonight, you go ahead and give and turn it in, and she'll take it for you."

The court deferred its decisions on the liability issues pending plaintiffs submission of a report on the issue of damages. Plaintiffs' report recommended that Whitfield, Payne, the Halls, and Talbert be held jointly and severally liable for over $51 million. Meanwhile, Talbert moved the court to dismiss him from the case on the ground that he had not been served with process and that he had not authorized Cunningham to appear at the trial as his attorney. The court denied Talbert's motion. Shortly thereafter, the court resolved the liability issues in favor of plaintiffs and against the Halls, Payne, Talbert, and Whitfield and awarded plaintiffs judgment against them jointly and severally in the sum of $51 million. Following the entry of judgment, Whitfield unsuccessfully sought relief under Fed. R. Civ. P. 59(e) and 60. Defendants thereafter appealed.

As an initial matter, we conclude that of the claims of error they have raised, the following are clearly frivolous

and we thus reject them without further comment: (1) the appellants were not "individuals" as defined under 5 U.S.C. § 552a(a)(2); (2) the district court did not have jurisdiction over the "Sovereign Citizens of the State Republics"; (3) the appellants were not citizens of the corporate United States; (4) the district court did not have jurisdiction over their capitalized names; (5) the district court lacked legislative and territorial jurisdiction; (6) the district court needed the consent of the appellants in order to assert jurisdiction over them; (7) the appellees did not have *parens patriae* authority over the appellants; and (8) the appellants had the right to practice their religious beliefs.

We turn then to the defendants' remaining claims: whether (1) the district court lacked subject matter jurisdiction over the lawsuit; (2) the district court lacked personal jurisdiction over Payne, Talbert, and Whitfield; (3) the Program constituted a security; (4) the district court abused its discretion by denying Whitfield discovery; (5) the district court abused its discretion in denying the motion for a jury trial; (6) the individuals identified as class members had to receive personal notice of the court's class certification order; (7) the district court erred in imposing liability against Brenda Hall; and (8) the district court abused its discretion in denying Whitfield's Rule 59(e) and Rule 60(b) motions. We address these issues in order.

A. *Subject Matter Jurisdiction*

Although Whitfield recognizes that plaintiffs used 28 U.S.C. § 1331 as the basis for the district court's subject matter jurisdiction, he claims that plaintiffs as agencies

did not qualify as citizens for diversity of citizenship purposes. The court therefore lacked jurisdiction over the state law claims. Payne and Talbert contend that the court lacked subject matter jurisdiction because the subject matter was biblical since the Program relied only on promises "made by the Lord Jesus Himself in Luke 6:38."

We conclude that the district court had subject matter jurisdiction over plaintiffs' federal claims. In the complaint, plaintiffs based these claims on the following statutes: (1) 15 U.S.C. §§ 771 and 77q; (2) § 10b of the 1934 Securities Exchange Act; (3) 15 U.S.C. § 78t(a); and (4) 15 U.S.C. § 77e. Both the Securities Act of 1933 and the Securities Exchange Act of 1934 specifically grant a district court jurisdiction over actions arising under either act. *See* 15 U.S.C. § 77v(a) ("The district courts of the United States . . . shall have jurisdiction of offenses and violations under [the Securities Act of 1933]. . . ."); 15 U.S.C. § 78aa ("The district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Securities and Exchange Act of 1934]. . . ."). We also conclude that the court did not abuse its discretion in exercising supplemental jurisdiction over plaintiffs' state law claims under 28 U.S.C. § 1367.

B. *Personal Jurisdiction*

1. *Payne*

Payne claims that the district court lacked jurisdiction over his person because he was a natural, sovereign person, not a corporate citizen, to which the jurisdictional statutes apply.

Service of process may occur (1) "pursuant to the law of the state in which the district court is located," or (2) "by

delivering a copy of the summons and of the complaint to the individual personally . . . or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." Fed. R. Civ. P. 4(e) (1), (2). Under Fed. R. Civ. P. 12(b), a party can raise the following two defenses, among others, in a motion: (1) lack of jurisdiction over the person; and (2) insufficiency of service of process. Fed. R. Civ. P. 12(b)(2), 12(b)(5). However, Rule 12(b)(2) or (b)(5) defenses can be waived "(A) if omitted from a motion [that has already been filed under Rule 12] or (B) if [they are] neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a)."). Fed. R. Civ. P. 12(h)(1). A pleading includes an answer. *See* Fed. R. Civ. P. 7(a) ("**Pleadings.** There shall be a complaint and an answer."). As a result, "we have found that a party's right to dispute personal jurisdiction on insufficient service of process grounds is waived if the party fails to assert that objection in his first Rule 12 motion, other initial pleading or general appearance." *In re Worldwide Web Systems. Inc.*, 328 F.3d 1291, 1299 (11th Cir. 2003).

As an initial matter, we note that Payne admitted in an affidavit that he retained Cunningham to represent him, GMIC, and certain elders. After plaintiffs filed suit, Payne, through Cunningham, filed an answer, which contained the following two defenses: (1) lack of subject matter jurisdiction; and (2) failure to state a claim. Payne did not raise insufficiency of process or lack of personal jurisdiction and thus waived these defenses. *See* Fed. R. Civ. P. 12(h). We therefore conclude that he could not assert a personal jurisdiction argument at a later time.

2. *Talbert*

Talbert likewise argues that the court lacked jurisdiction over his person because he was a natural person. In his reply brief, he contends that the district court lacked such jurisdiction because plaintiffs admitted that he never received service of process.

"Normally judicial admissions are binding for the purpose of the case in which the admissions are made, not in separate and subsequent cases." *Matter of Raiford*, 695 F.2d 521, 523 (11th Cir. 1983); *see also United States v. Cravero*, 530 F.2d 666, 671-72 (5th Cir. 1976) ("Defense counsel clearly has the authority to make judicial admissions for his client during the course of the trial"); *Hill v. Federal Trade Commission*, 124 F.2d 104, 106 (5th Cir. 1941) (noting that in the context of pleadings that "it is fundamental that judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them.").

We conclude that the district court erred in determining that it had personal jurisdiction over Talbert. Although the court found that it had jurisdiction over his person by virtue of his answer to the complaint, plaintiffs admitted at trial that they never properly served Talbert and therefore were not seeking judgment against him. We therefore vacate the judgment against Talbert and remand the case with the instruction that the court delete Talbert's name from the judgment.

3. *Whitfield*

Whitfield complains that the district court lacked jurisdiction over his person because he was never personally served and he never agreed to have anyone accept service for him.

"Personal jurisdiction is a composite notion of two separate ideas: amenability to jurisdiction, or predicate, and notice to the defendant through valid service of process." *See Prewitt Enterprises. Inc.*, 353 F .3d at 925 n.15 (citation and internal quotation marks omitted). Actual notice is not enough to render insufficient service or process sufficient and thus confer personal jurisdiction. *See id.* at 924 & n.14. However, a party can waive lack of personal jurisdiction as a defense. *Insurance Corp. of Ireland. Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04, 102 S.Ct 2099, 2105, 72 LEd.2d 492 (1982). While Fed. R. Civ. P. 12(h) provides some ways that a party can waive their defense that a court lacked personal jurisdiction, Rule 12(h) does not provide the only means with which a party can waive jurisdiction. *Peterson v. Highland Music. Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998) ("It does not follow, however, that a party's failure to satisfy those minimum steps [under Rule 12(h)] constitutes the only circumstance under which the party will be deemed to have waived a defense."). "[T]he privileged defenses referred to in Rule 12(h)(1) "may be waived by formal submission in a cause, or by submission through conduct" *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993) (citing numerous cases; internal quotation marks omitted).

We conclude that Whitfield waived his jurisdictional argument because he participated in the pretrial process

and submitted to the court's jurisdiction by (1) filing numerous motions throughout the pretrial proceedings and during the post-trial proceedings and (2) participating fully in the trial.

C. *The Faith Promises Program*

Defendants contend that the Program was not a securities program because the investors signed agreements that stated that the Program was not an investment and there was no expectation of a return.

A security under Alabama law and the Securities Act of 1933 is defined as "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract*. . . ." 15 U.S.C. § 77b(a)(1); Ala. Code § 8-6-2(10). Ohio law defines a security in part as "any investment contract" O.R.C. § 1707.01(B). Under *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-99, 66 S.Ct 1100, 1103, 90 L.Ed. 1244 (1946), a security for the purposes of the 1933 Act is "a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. . . ." *See also Gallion v. Alabama Market Centers, Inc.*, 213 So.2d 841, 845 (Ala. 1968) (adopting *Howey* to determine whether something constitutes a security). We look for three elements: "(1) an investment of money, (2) a common enterprise, and (3) the expectation of profits to be derived solely from the efforts of others." *S.E.C. v. Unique Financial Concepts. Inc.*, 196 F.3d 1195, 1199 (11th Cir. 1999) (citation and internal quotation marks omitted). "[A]

common enterprise exists where the fortunes of the investor are interwoven with and dependent on the efforts and success of those seeking the investment or of third parties." *Id.*

We find no error in the district court's determination that the Program was a security because: (1) investors in the Program provided GMIC with money through couriers or direct mailings; (2) their money was tied to the efforts of others, and they relied on the efforts of others to deliver a 10% return on their money and double their initial investment; (3) the GMIC marketed the Program by promising a return and sharing success stories of those who had joined the Program.

D. *Discovery*

Whitfield contends that the district court erred by failing to order the court appointed receiver, the forensic accountant, and the bankruptcy trustee to respond to his interrogatories and/or document requests. Whitfield also complains that the magistrate judge ignored some of his requests for other discovery, including access to accounting records and the GMIC's computer system and databases.

We conclude that the district court did not abuse its discretion by denying Whitfield discovery for the following reasons. First, many of Whitfield's motions for discovery were made after the court-imposed September 30,2002, deadline for discovery. Also, none of the individuals from whom Whitfield sought discovery were parties to the lawsuit; hence, they were not required to answer interrogatories or produce evidence merely at Whitfield's request. Instead, Whitfield needed a subpoena to obtain discovery from the non-parties, and there is no evidence

that the court issued a subpoena requiring a non-party to produce documents.

E. *Jury Trial*

Whitfield contends that he requested a jury as indicated by a docket entry, which stated that the trial was to be by jury. Whitfield says that he did not waive his Seventh Amendment right to a jury trial and had no reason to request one because no one objected to the court order indicating that the case would be tried in front of a jury. Also, Whitfield submits that he did not give his consent to withdraw his demand for a jury trial as required by Fed. R. Civ. P. 38. Finally, citing Fed. R. Civ. P. 39, he contends that the court abused its discretion by failing to order a jury trial.

"The Seventh Amendment right to a civil jury is not absolute and may be waived if the request for a jury was not timely"; however, "because the right to a jury trial is fundamental, courts must indulge every reasonable presumption against waiver." *Burns*, 53 F.3d at 1240 (citation and internal quotation marks omitted). Under Fed. R. Civ. P. 38, a party may demand a jury trial by serving a demand for one within "*10 days after the service of the last pleading directed to* [*any issue triable of right by a jury*]." Fed. R. Civ. P. 38(b) (emphasis added). "The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury." Fed. R. Civ. P. 38(d).

However, where a party fails to follow the requirements under Rule 38, "the court in its discretion upon motion may order a trial by a jury of any or all issues." Fed. R. Civ. P. 39(b). Our general rule regarding "belated

jury requests under Rule 39(b) is that the trial court should grant a jury trial in the absence of strong and compelling reasons to the contrary." *Parrott*, 707 F.2d at 1267. We have noted that the district courts balance the following five factors in determining whether to grant a Rule 39(b) motion: "(1) whether the case involves issues which are best tried to a jury; (2) whether granting the motion would result in a disruption of the court's schedule or that of the adverse party; (3) the degree of prejudice to the adverse party; (4) the length of the delay in having requested a jury trial; and (5) the reason for the movant's tardiness in requesting a jury trial." *Id.* In reviewing a district court's decision to deny a Rule 39(b) motion, we "give considerable weight to the movant's excuse for failing to make a timely jury request. If that failure is due to mere inadvertence on the movant's part, we generally will not reverse the trial court's refusal to grant a 39(b) motion." *Id.*

We conclude that the district court did not abuse its discretion in denying Whitfield's untimely motion for a jury trial because: (1) Whitfield's reliance on the docket entry dated July 2002 does not explain why he failed to file a motion for a jury trial more than three years after the law suit commenced; (2) Whitfield filed his motion one week before the trial was to begin, meaning that his late request was "likely to disrupt the court's schedule and cause great prejudice," *Sullivan v. School Bd. of Pinellas County*, 773 F.2d 1182, 1188 (11th Cir. 1985); and (3) the court's involvement in the case since 1999 suggests that the court was familiar with the facts and would be able to decide the issues efficiently.

F. *Class Certification*

Whitfield contends that the 3,800 individuals in the class action lawsuit were not informed that they were part of the class action in violation of Fed. R. Civ. P. 23(c)(2). Whitfield also raises a number of new arguments in his reply brief, which we will not consider because they were not raised in the initial brief. *See Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003).

To certify a class, "all of the requirements of Rule 23(a) must be met, as well as one requirement of Rule 23(b)." *Id.* The requirements under Rule 23(a) are "numerosity, commonality, typicality, and adequacy of counsel." *Id.* at 1255-56; Fed. R. Civ. P. 23(a). Rule 23(b) contains three standards, one of which must be met: (1) the prosecution of separate actions would lead to inconsistent results for members of the class or would dispose of the interests of the other members who are not parties, Fed. R. Civ. P. 23(b)(1); (2) the party opposing the class acted on grounds applicable to the class, "thereby making appropriate final injunctive relief," Fed. R. Civ. P. 23(b)(2); or (3) a question of law or fact is common to the members of the class and a class action is superior, Fed. R. Civ. P. 23(b)(3). Where a class action is brought under Rule 23(b)(3), "the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

We conclude that the members of the certified class did not require notice pursuant to Rule 23(c)(2). Although the district court's amended order was not clear as to whether the court was certifying a class under Rule 23(b)(1), (b)(2), or (b)(3), plaintiffs requested that the court

certify the class under Rule 23(b)(1) and Rule 23(b)(2), indicating that the court's grant of the certification motion encompassed either a Rule 23(b)(1) or (b)(2) class. Because there is no indication that the court granted certification for a Rule 23(b)(3) class, Rule 23(c)(2)'s notice requirement does not apply.

G. *Brenda Hall*

Brenda Hall contends that she was not an elder and she did not hold a position of importance in the church, merely playing the church's organ and serving briefly as a courier, which had no role in the "gift" scheme. Hall contends that while she was at some meetings with her husband, she did not attend all the meetings, her name was not on any of the business's documents, and she did not receive gas money. Therefore, Hall asserts that plaintiffs failed to "produce[] sufficient evidence for the court to charge" Brenda Hall.

To prove liability under §§ 10(b) and 14(e) of the Securities and Exchange Act of 1934 and accompanying Rule 10b-5, a plaintiff must prove the defendant acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud." *U.S. S.E.C. v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004). The test to determine whether an individual is liable as a controlling person is whether: (1) the individual violated securities laws; and (2) the individual "had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws . . . [and] had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability."

Brown v. Enstar Group. Inc., 84 F.3d 393, 396-97 (11th Cir. 1996) (citation and internal quotation marks omitted).

We conclude that there was sufficient evidence for the district court to hold Brenda Hall liable because: (1) Hall's presence at meetings where individuals were recruited to become donors and her role in collecting money at these meetings indicated that she acted with scienter; and (2) her attendance at elders meetings where (a) she sat next to her husband in the front of the room and (b) elders discussed how to continue to recruit new members into the Faith Promises Program suggests that she was a controlling person.

H. The Rule 59 e and Rule 60 b Motions

1. *Scienter*

Whitfield contends that plaintiffs failed to offer evidence that he knowingly made false statements, and he did not know that his previous statements had been considered misleading. Whitfield claims that investors freely contributed to the church, and any individual who was dissatisfied could have their investments returned. Whitfield claims that plaintiffs failed to make their allegations with particularity as required by Fed. R. Civ. P. 9(b). Finally, Whitfield contends that the investors were told that they were making a donation and that it was not an investment. (*Id.* at 26).

Under § 10b of the 1934 Act, it is unlawful "for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or *any security not so registered*, . . . any manipulative or

deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (emphasis added). Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

The elements of a Rule 10b-5 claim are: "(1) the defendant made a false statement or omission of material fact (2) with scienter (3) upon which the plaintiff justifiably relied (4) that proximately caused the plaintiffs damages." *Bruschi v. Brown*, 876 F.2d 1526, 1528 (11th Cir. 1989). Whitfield only contests the scienter element, which is defined as "a mental state embracing intent to deceive, manipulate, or defraud." *See Ginsburg*, 362 F.3d at 1297.

As preliminary matters, Whitfield waived his argument that defendants did not plead with the particularity required under Fed. R. Civ. P. 9 because he raised the

argument for the first time on appeal. Also, his argument that investors could opt out of the Program by asking for their money to be returned is belied by the evidence.

We conclude that the district court did not abuse its discretion in finding that Whitfield acted with scienter because: 1) Whitfield, as an elder, received a 5% "gift" for all "donations" for which he was responsible, suggesting that he knew that he was selling securities as this 5% arrangement was reminiscent of a commission; (2) Whitfield was willing to falsely evade questions from potential "donors" regarding whether he was receiving "gas money"; (3) Whitfield wrote a newsletter at the time when the Program was in financial trouble, indicating that the Program had gifted out $1 billion and that a GMIC storehouse would hold individuals' money even though Whitfield failed to confirm whether either claim was true; and (4) Whitfield knew that GMIC was not relying on gold and diamond mines as profit centers despite informing investors about GMIC's claims in these mines.

3. 51 Million Judgment

Whitfield claims that the court order should not require defendants to reimburse all who made claims, specifically, those who indicated that they were making "donations" or "gifts," as opposed to those who gave money as an investment and who should have been reimbursed.

We conclude that the district court did not abuse its discretion in entering a $51 million judgment in favor of plaintiffs because the bankruptcy trustee testified that claims against GMIC would total approximately $51 million and plaintiffs filed a report showing the total liability to be $51 million. As for Whitfield's claims that

the bankruptcy trustee's calculations included claims by people who stated that they donated money, and did not invest it, we do not find this claim persuasive because the Program used the language of "gift" and "donation" to describe the program, so the creditors cannot be faulted for using the program's language; and (2) the bankruptcy trustee testified that the claims went through a winnowing process to determine which claimants presented valid claims.

4. *Controlling Person*

Whitfield claims that: (1) GMIC was formed as an unincorporated Church or a religious society without stock or a board of directors; (2) Payne was the only person with control or responsibility for GMIC assets; and (3) the elders were not "control persons" because they had no authority over the donors.

A controlling person under the 1934 Securities and Exchange Act is one "who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable." *Brown*, 84 F.3d at 395-96 (quoting 15 V.S.C. § 78t(a)). As mentioned above, the test to determine whether an individual is liable as a controlling person under § 78t(a) is whether: (1) the individual violated securities laws; and (2) the individual "had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws . . . [and] had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in

the primary liability." *Id.* at 396-97 (citation and internal quotation marks omitted); *see also In re Villa*, 261 F.3d 1148, 1152 (11th Cir. 2001) (noting that a controlling person "may include . . . any person who has the power to control the conduct of another person who has violated securities laws").

We conclude that the district court did not abuse its discretion in determining Whitfield was a controlling person because: (1) Whitfield as an elder, received "gas money" for recruiting new people to the program; and (2) Whitfield came to the GMIC to establish a courier program, which meant that he would have guided individuals to sell the fraudulent securities.

4. *Fraud Upon the Court*

Whitfield lists nineteen instances of fraud on the court and attaches documents that purportedly support his claims.

Rule 60(b) permits a party to move for relief from judgment because of fraud by an adverse party if the motion is filed within one year of the judgment's entry. Fed. R. Civ. P. 60(b)(3). However, under the "savings clause" of Fed. R. Civ. P. 60(b), the district court can "entertain an independent action . . . to set aside a judgment for fraud upon the court" outside of the one year time limit. *See Booker*, 825 F.2d at 282 n.1.

Fraud upon the court is a narrow concept, and it should "embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task

of adjudging cases that are presented for adjudication." *Kerwit Med. Prod.. Inc. v. N. & H. Instruments. Inc.*, 616 F.2d 833, 837 (5th Cir. 1980) (citation omitted). Generally, "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court." *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978). To obtain relief of judgment for fraud on the court, "the fraud must be established by clear and convincing evidence." *Booker*, 825 F.2d at 283. "[C]onclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud. . . ." *Id.* at 283-84 (citation and internal quotation marks omitted).

We conclude that Whitfield has failed to establish that plaintiffs committed fraud upon the district court. First, many of his allegations are only supported by "conclusory averments" without any supporting proof of his claims, including: (1) the ASC counsel lied about not working for the government; (2) the plaintiffs lied about diversity of citizenship; (2) Pennsylvania and Smith submitted fraudulent proof of claim forms; (3) Smith had donors change their proof of claim filings; and (4) Borg made false statements at trial. Second many of Whitfield's fraud claims are not evidence of fraud because: (1) the district court was aware that he was not provided discovery because it determined that Whitfield improperly requested discovery; (2) the issue of whether the receiver properly placed GMIC in bankruptcy is a question of law; (3) Smith's statement that the Program was not an investment constituted an opinion that had support in the evidence; and (4) the

statement by the ASC director that the Program was not an annuity constituted an opinion that was supported by evidence. Also we conclude that the evidence that Whitfield attached to support his fraud allegations, namely the creditors' bankruptcy claims that indicated they had donated gifts instead of invested money, does not indicate fraud or that the trustee misrepresented the bankruptcy claims, but instead shows that people who lost money in the Program used the terminology of the Program.

For the forgoing reasons, we affirm the district court's judgment against the Halls, Whitfield, and Payne and vacate the judgment against Talbert in No. 03-13776. Also, we affirm the district court's denial of Whitfield's Rule 59(e) and 60(b) motions in No. 03-15919.

AFFIRMED, in part, and VACATED and REMANDED, in part.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALABAMA SECURITIES COMMISSION and OHIO DIVISION OF SECURITIES,

Plaintiffs,

v. **Case No. 99-cv-1786-T-30MSS**

GREATER MINISTRIES INTERNATIONAL, INC.; GREATER MINISTRIES INTERNATIONAL) CHURCH; GREATER MINISTRIES INTERNATIONAL; GERALD PAYNE; BETTY PAYNE; HAYWOOD EUDON HALL a/k/a DON HALL; BRENDA HALL; DAVID WHITFIELD; ANDREW J. KRISHAK *a/k/a* JOHN KRISHAK; and ELDERS OF GREATER MINISTRIES INTERNATIONAL CHURCH,

Defendants.

AMENDED FINAL JUDGMENT

(This Order amends the Final Judgment by adding the language found in paragraph 6 on pages 13 and 14 herein to clarify that this Final Judgment shall not impose liablility or claim against the bankruptcy estate in the confirmed Chapter 11 case of *In Re: Greater Ministries International, Inc.*, Case No. 99-13967-8B1, filed in the United States Bankruptcy Court for the Middle District of Florida.)

This cause came on for bench trial against the individual defendants listed hereafter, on February 3, 2003. Oral testimony, submission of evidence and oral arguments were concluded on February 6, 2003, and the Court took the matter under submission at that time, subject to receiving supplemental data requested on February 6, 2003, of the Plaintiffs by the Court. The Court subsequently received written reports and requests for judgment from the Plaintiffs, and has considered those together with any responses from any Defendants.

The Court has considered the evidence presented and admitted at trial, together with the August 24, 1999, permanent injunction issued by this Court after hearing, and the authorities and arguments submitted by any of the parties. Based upon the foregoing, the Court finds and determines as follows:

I. Findings of Fact

1. This Court has personal jurisdiction of the Plaintiffs and of all of the following Defendants (collectively, "Defendants"), listed here generally in order of their alleged Elder" number in the records of Greater Ministries International, Inc., Greater Ministries International Church and Greater Ministries International ("OMI"):

Jim Chambers
Henry E. Showalter
Tom Parker
Keith Roadarmer
Louie E. Strawder
Fay Fry
Gerald Payne
Betty Payne
David Whitfield

Scott Hughes
Patrick H. Talbert
John Krishak
Jim Mawdsley
Jim Biggerstaff
Paul Bennett
C. C. Carlman
Nova Miller
Norman Lower
Don Hall
Brenda Hall
J. Ed Strawder
Patsy Tharp
B.B. Burnett
Tom B. Sleep
Charles A. Eidson
Frank Huffman
Al Dayton
Sid Howell
Jack Coe
Jack C. Hudson
Greater Ministries International, Inc.
Greater Ministries International
Church Greater Ministries International

2. GMI, under the control of its Elders and Directors, which included the above Defendants, and through the participation and efforts of such Defendants, engaged in the creation, offer and sale, and caused others acting under their direction or control to offer and sell, investment contracts and programs which constitute "securities" within the meaning of the federal Securities Act of 1933 [15 U.S.C. § 77a, *et seq.*] (the "1933 Act"), the federal Securities Exchange Act of 1934 [15 [U].S.C. § 78a, *et seq.*] (the "1934 Act"), the Alabama Securities Act [*Ala. Code* § 8-6-1, *et seq.* 1975] (the "Alabama Act"), and the Ohio Securities Act, Chapter 1707 of the Ohio Revised Code (the

"Ohio Act"). At the relevant times each of the Defendants was a controlling person, and a member of the controlling persons group, of GMI.

3. The Defendants, directly and through their agents and those acting in concert or conspiracy with them or under Defendants' direction and control, have offered and sold, and solicited purchases of, securities in Alabama, Ohio and other parts of the United States which were not registered for offer and sale under the 1933 Act, the Alabama Act and the Ohio Act.

4. The Defendants were paid commissions or compensation in connection with such securities sales which they referred to as "gas money." They were advised by persons on the Board of Elders not to reveal to offerees that they were receiving gas money.

5. The Defendants have not borne their burden of proving facts which establish that the securities which they have offered and sold were entitled to any exemption from registration under the 1933 Act, the Alabama Act and the Ohio Act.

6. The Defendants, directly and through their agents and those acting in concert or conspiracy with them or under Defendants' direction and control, have offered and sold, and solicited purchases of, securities in Alabama, Ohio and other parts of the United States through persons (including various of the individual defendants) who were not, and are not, licensed or registered as broker-dealers or as salesmen of securities under the 1934 Act, the Alabama Act or the Ohio Act.

7. The Defendants have not borne their burden of establishing facts proving that the agents and salesmen,

or themselves, through which said securities were offered and sold, were entitled to any exemption from broker-dealer registration and securities salesman licensing under the 1934 Act, the Alabama Act and the Ohio Act

8. The Defendants, directly and through their agents and those acting in concert or conspiracy with them or under Defendants' direction and control, have knowingly and intentionally offered and sold, or caused to be offered and sold, and solicited purchases of, securities and investment contracts in Alabama, Ohio and other parts of the United States through the use of: (a) misstatements of material fact; and (b) omissions of material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading; in violation of the anti-fraud proscriptions of the 1993 Act, the 1934 Act, the Alabama Act, and the Ohio Act.

9. The Defendants, directly or through agents and representatives for whose actions they are responsible, have engaged in sales of securities that are not registered under the aforesaid federal and state securities laws, through the actions of unlicensed securities salesmen, by means of fraudulent representations and deceptive omissions to disclose material facts.

10. The Defendants, directly and through agents acting under their direction and control, have employed the United States Mails and means and instruments of communication and transportation in interstate commerce, in connection with the aforesaid securities transactions which are the subject of this action.

11. Investors in Alabama, Ohio and in many other states throughout the United States have suffered great hardship and financial injury as the direct result of

Defendants' fraud, breach of fiduciary duty, misconduct and breaches of statutory provisions. This action is suitable for class certification on the claims brought herein under the 1933 Act, the 1934 Act, the Alabama Act and the Ohio Act, above cited.

12. It is appropriate that the class of victims of the Defendants' securities violations be the same as those persons whose proofs of claim have been filed and allowed in the GMI bankruptcy case in this Court, *In Re Greater Ministries International, Inc., Debtor,* No. 99-13967-8Bl (Ch. 11). The Court finds that the damages of the Class aggregate the sum of **$49,806,483.08**, which was the sum introduced at trial, plus an amount of recently-allowed claims of **$576,000.00**, as testified to by Kevin O'Halloran at trial, for a total of **$50,382,483.08**.

13. The Court has made the requisite evaluations of individual responsibility and joint and several liability determinations called for under the PSLRA amendments to the 1934 Act, and finds that on the basis of all the testimony and evidence, the following amounts of individual liability for class damages should be assessed against the defendants (the Court noting that nothing in this order and judgment shall be deemed to supersede the disgorgement and restitution orders entered in any defendant's criminal proceedings, but that any recovery in the criminal proceedings of a defendant will serve as a credit against the judgment amount herein):

Name of Defendant of ¶12 Amount.	Defendant's Share
Greater Ministries International, Inc. (Joint and several for 100%) Greater Ministries	$50,382,483.08

International Church (Joint and several for 100%)	$50,382,483.08	
Greater Ministries International (Joint and several for 100%)	$50,382,483.08	
Jim Chambers (Joint and several for 100%)	$50,382,483.08	
Henry E. Showalter (Joint and several for 100%)	$50,382,483.08	
Tom Parker	$670,087.02	(1.33%)
Keith Roadarmer (Joint and several for 100%)	$50,382,483.08	
Louie E. Strawder (Joint and several for 100%)	$50,382,483.08	
Fay Fry	$261,988.91	(0.52%)
Gerald Payne (Joint and several for 100%)	$50,382,483.08	
Betty Payne (Joint and several for 100%)	$50,382,483.08	
David Whitfield (Joint and several for 100%)	$50,382,483.08	
Scott Hughes	$5,038.25	(0.01%)
Patrick H. Talbert (Joint and several for 100%)	$50,382,483.08	
John Krishak (Joint and several for 100%)	$50,382,483.08	
Jim Mawdsley	$952,228.93	(1.89%)
Jim Biggerstaff	$1,274,676.82	(2.53%)
Paul Bennett	$146,109.20.	(0.29%)
C. C. Carlman	$6,352.00	(his "gas money")
Nova Miller	$2,121,102.54	(4.21%)
Norman Lower	$11,828.00	(his "gas money")
Don Hall (Joint and several for 100%)	$50,382,483.08	
Brenda Hall (Joint and several for 100%)	$50,382,483.08	

J. Ed Strawder	$2,272,249.99	(4.51%)
Patsy Tharp	$665,048.78	(1.32%)
B.B. Burnett	$498,786.58	(0.99%)
Tom B. Sleep	$911,922.94	(1.81%)
Frank Huffman	$2,252,096.99	
(2.66% + 1.81% total 4.47%)		
Al Dayton	$50,382,483.08	
(Joint and several for 100%)		
Sid Howell	$1,526,589.24	(3.03%)
Jack C[o]e	$136,032.70	(0.27%)
Jack C. Hudson	$50,382,483.08	
(Joint and several for 100%)		

II. Conclusions of Law

1. This Court has subject matter jurisdiction of this action and the claims therein pursuant to the 1933 Act and the 1934 Act. The Court has, and exercises, supplemental jurisdiction over the claims asserted herein under the Alabama Act and the Ohio Act, pursuant to 28 U.S.C. § 1367.

2. Venue is proper in this District pursuant to § 27 of the 1934 Act, § 22 of the 1933 Act, and 28 U.S.C. § 1391(b).

3. The Defendants' Faith Promises program, and the units of participation therein, and any "regifts" made thereunder, constitute an investment contract and a "security" within the meaning of the 1933 Act. The redeemable certificates issued by or under the direction and authority of Defendants, copies of which are part of the Record of the Hearing, are also a "security" and evidence of a security, within the meaning of the 1933 Act. Defendants' double-your-money programs, however labeled by them, involving expectation of a return or any so-called "gift back" to the person originally delivering the money to

the Defendants, constitute an investment contract and a "security" within the meaning of the 1933 Act.

4. The Defendants' Faith Promises program, and the units of participation therein, and any "regifts" made thereunder, constitute an investment contract and a "security" within the meaning of the 1934 Act. The redeemable certificates issued by or under the direction and authority of Defendants, copies of which are part of the Record of the Hearing, are also a "security" and evidence of a security, within the meaning of the 1934 Act. Defendants' double-your-money programs, however labeled by them, involving expectation of a return or any so-called "gift back" to the person originally delivering the money to the Defendants, constitute an investment contract and a "security" within the meaning of the 1934 Act.

5. The Defendants' Faith Promises program, and the units of participation therein, and any "regifts" made thereunder, constitute an investment contract and a "security" within the meaning of the Alabama Act. The redeemable certificates issued by or under the direction and authority of Defendants, copies of which are part of the Record of the Hearing, are also a "security" and evidence of a security, within the meaning of the Alabama Act. Defendants' double-your-money programs, however labeled by them, involving expectation of a return or any so-called "gift back" to the person originally delivering the money to the Defendants, constitute an investment contract and a "security" within the meaning of the Alabama Act.

6. The Defendants' Faith Promises program, and the units of participation therein, and any "regifts" made thereunder, constitute an investment contract and a

"security" within the meaning of the Ohio Act. The redeemable certificates issued by or under the direction and authority of Defendants, copies of which are part of the Record of the Hearing, are also a "security" and evidence of a security, within the meaning of the Ohio Act. Defendants' double-your-money programs, however labeled by them, involving expectation of a return or any so-called "gift back" to the person originally delivering the money to the Defendants, constitute an investment contract and a "security" within the meaning of the Ohio Act.

7. The Defendants have failed to bear their burden of, establishing the availability or applicability of any exemption under the 1933 Act, the Alabama Act and the Ohio Act from registration of the securities which are the subject of this action.

8. The Defendants have failed to bear their burden of establishing the availability or applicability of any exemption under the 1934 Act, the Alabama Act and the Ohio Act from broker-dealer registration and securities salesmen licensing of any of the Defendants and their agents, with respect to offers, sales and solicitation of investments or purchases of the securities which are the subject of this action.

9. The Agency Plaintiffs have *parens patriae* authority and statutory authority, and otherwise have standing, to bring each of the claims and seek the forms of relief set forth in the Complaint for themselves and for investors, as amended. The individual Class representatives have standing to represent and have adequately represented the Class.

10. The relief awarded and ordered herein is not intended to, and does not, affect or preclude any religious

beliefs, religious tenets, or religious practices of any Defendants, within the meaning of Supreme Court and Eleventh Circuit case law construing the First Amendment.

11. The Defendants, directly and through agents acting under Defendants' direction and control, have, under the "cloak of religion," but not as a part of any constitutionally protected religious observation or belief, and instead as a course of conduct of a securities business and of offering and selling investment contracts and securities:

> (A) committed fraud upon citizens of Alabama, Ohio and numerous other states;
>
> (B) violated the anti-fraud provisions of the 1933 Act, the 1934 Act, the Alabama Act, and the Ohio Act;
>
> (C) violated the securities registration requirements of the 1933 Act, the Alabama Act and the Ohio Act; and
>
> (D) violated the securities broker-dealer and securities salesmen licensing and registration requirements of the 1934 Act, the Alabama Act and the Ohio Act.

12. By reason of their conduct, the Defendants were unjustly enriched (through the gas money and otherwise), and are, constructive trustees for their victims, the investors in the Class, of all monies, property and assets obtained or received by Defendants, their couriers, "contact persons," agents and confederates, from such investors, and owe fiduciary duties, which they have breached.

FINAL JUDGMENT

It is therefore the final order and judgment of this Court that the following defendants shall be liable to the Class, as a whole, in the following respective amounts:

Greater Ministries International, Inc.
$50,382,483.08

Greater Ministries International Church
$50,382,483.08

Greater Ministries International
$50,382,483.08

Jim Chambers
$50,382,483.08

Henry E. Showalter
$50,382,483.08

Tom Parker
$670,087.02

Keith Roadarmer
$50,382,483.08

Louie E. Strawder
$50,382,483.08

Fay Fry
$261,988.91

Gerald Payne
$50,382,483.08

Betty Payne
$50,382,483.08

David Whitfield
$50,382,483.08

Scott Hughes
$5,038.25

Patrick H. Talbert
$50,382,483.08

John Krishak
$50,382,483.08

Jim Mawdsley
$952,228.93

Jim Biggerstaff
$1,274,676.82
Paul Bennett
$146,109.20
C. C. Cadman
$6,352.00
Nova Miller
$2,121,102.54
Norman Lower
$11,828.00
Don Hall
$50,382,483.08
Brenda Hall
$50,382,483.08
J. Ed Strawder
$2,272,249.99
Patsy Tharp
$665,048.78
B.B. Burnett
$498,786.58
Tom B. Sleep
$911,922.94
Frank Huffman
$2,252,096.99
Al Dayton
$50,382,483.08
Sid Howell
$1,526,589.24
Jack C[o]e
$136,032.70
Jack C. Hudson
$50,382,483.08

1. Plaintiff's Motion for Class Certification (Dkt. #444) is GRANTED. The class of Plaintiffs shall be those persons whose proofs of claim have been filed and allowed in the OMI bankruptcy case in this Court, *In Re Greater*

[M]inistries International, Inc., Debtor, No. 99-13967-8Bl (Ch. 11).

2. Plaintiffs Motion for Assignment of Liability (Dkt. # 500) is GRANTED.

Liability is assigned as set forth herein.

3. Intervener Defendant Talbert's Motion to Dismiss Patrick Henry Talbert

(Dkt. #507) is DENIED.[1]

4. The Clerk is directed to enter final judgment in favor of the Plaintiffs and against Defendants in the amounts set forth herein.

5. The Court will retain jurisdiction for post-judgment collection proceedings and disbursement of any recovery to the bankruptcy court for distribution, and for class notice.

6. Provided however and notwithstanding anything to the contrary, nothing contained herein shall constitute, operate or be construed to impose any liability or claim against the bankruptcy estate or estate assets of Greater Ministries International, Inc., Greater Ministries International Church, or Greater Ministries International in the confirmed Chapter 11 case of *In Re: Greater Ministries International Inc.,* Case No. 99-13967-8B1, which was filed

---

[1] The Court finds that Talbert appeared and submitted to the personal jurisdiction of this Court through then counsel Albert Cunningham by his Answer to the Complaint (Dkt. #36). Additionally, in its Permanent Injunction Order of August 24, 1999, the Court found that personal jurisdiction existed over the Church's 26 elders, one of whom is Talbert.

in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, or otherwise affect the administration of the bankruptcy case, alter the terms of the Confirmed Plan of Liquidation, as amended or impose any liability, obligation or claim against Kevin O'Halloran, as Chapter 11 Trustee for Greater Ministries International, Inc.

7. The Clerk is directed to close this file and terminate all pending motions as moot.

DONE and **ORDERED** in Tampa, Florida on this 25 day of July, 2003.

/s/ James S. Moody, Jr.
JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-13776-BB

ALABAMA SECURITIES COMMISSION,
OHIO DIVISION OF SECURITIES,

Plaintiffs-Counter
Defendants-Appellees,

WILLIAM C. SMITH, on behalf of
themselves and all persons
similarly situated, et al.,

Intervenor-Plaintiffs,

versus

GREATER MINISTRIES
INTERNATIONAL, INC., et al.,

Defendants-Counter
Claimants,

GERALD PAYNE,
HAYWOOD EUDON HALL,
a.k.a. Don Hall, et al.,

Defendants-Counter
Claimants-Appellants,

WILLIAM F. HEASTON, et al.,

Intervenor-Defendants.

No. 03-15919-BB

ALABAMA SECURITIES COMMISSION,
OHIO DIVISION OF SECURITIES,

Plaintiffs-Counter
Defendants-Appellees,

WILLIAM C. SMITH, on behalf of
themselves and all persons
similarly situated, et al.,

Intervenor-Plaintiffs,

versus

GREATER MINISTRIES
INTERNATIONAL, INC., et al.,

Defendants-Counter
Claimants,

DAVID WHITFIELD,

Defendant-Counter
Claimant-Appellant,

WILLIAM F. HEASTON, et al.,

Intervenor-Defendants.

On Appeal from the United States District Court
for the Middle District of Florida

Before: TJOFLAT, BIRCH and BARKETT, Circuit Judges.

PER CURIUM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc for Appellant, Whitfield are DENIED.

ENTERED FOR THE COURT:

/s/ _____
UNITED STATES CIRCUIT JUDGE

APPENDIX D

689 So. 2d 328, 1997 Fla. App. LEXIS, 923, 22 Fla. Law W. D 385

GREATER MINISTRIES INTERNATIONAL, INC., d/b/a Greater Trust d/b/a Ultimate Pension Fund, GERALD D. PAYNE and BETTY L. PAYNE, Appellants, v. STATE OF FLORIDA, ROBERT F. MULLIGAN AS THE COMPTROLLER AND HEAD OF THE DEPARTMENT OF BANKING AND FINANCE, Appellee.

Case No. 96-01964

COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

689 So. 2d 328; 1997 Fla. App. LEXIS 923; 22 Fla. Law W. D 385

February 5, 1997, Filed

SUBSEQUENT HISTORY: Rehearing Denied March 3, 1997. Released for Publication March 25, 1997.

PRIOR HISTORY: Appeal from nonfinal order of the Circuit Court for Hillsborough County; Guy W. Spicola, Judge.

DISPOSITION: Affirmed in part, reversed in part, and remanded.

CORE TERMS: double, pledge agreement, registered, cease and desist order, pledge, temporary injunction, church, unregistered, certificate, injunction, scheduled, repayment, promised, dealers, donor

COUNSEL: Paul B. Johnson of Johnson & Johnson, Tampa, and Eric M. Lieberman and Michael Ludwig of Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., New York, New York, for Appellants.

Harry Hooper, General Counsel, and Deborah Guller, Assistant General Counsel, Ft. Lauderdale, for Appellee.

JUDGES: PATTERSON, Judge. DANAHY, A.C.J., and ALTENBERND, J., Concur.

OPINION BY: PATTERSON

OPINION:

PATTERSON, Judge.

The appellants, **Greater Ministries International, Inc.** (Greater Ministries), Gerald R. Payne and Betty L. Payne, challenge the trial court's temporary injunction which prohibits them from obtaining contributions to their organization on the basis that the "pledge agreement" constitutes an unregistered security. We affirm the injunction as to the "Double Your Money" and the "Double Your Blessings" programs and we reverse as to the "Faith Promises" program.

Greater Ministries is a nonprofit corporation organized for religious and educational purposes under chapter 617, Florida Statutes. Gerald and Betty Payne are ordained ministers of Greater Ministries. In the past, Greater Ministries solicited contributions under two programs known as "Double Your Money" and "Double Your Blessings." These programs were essentially identical and promised the contributors would receive back double the amount of their contributions in scheduled payments. The pledge agreement contained the following schedule at the bottom of the page:

GREATER TRUST "GIFT-IN" RECEIPT for

In the Amount of ($)

Date Received: / / 6 Month Scheduled Gift Out: Scheduled after maturity

Maturity Amount (credit) in 10 Equal Parts

Gift In: Receipt #

$	250	500	$	50/mo.
$	500	1,000	$	100/mo.
$	1,000	2,000	$	200/mo.
$	2,000	4,000	$	400/mo.
$	3,000	6,000	$	600/mo.
$	4,000	8,000	$	800/mo.
$	5,000	10,000	$	1,000/mo.

Appellee Department of Banking and Finance issued an emergency cease and desist order predicated on a conclusion of law that the "Double Your Money" program certificates were unregistered securities and that the individual respondents (the Paynes and others) were not registered securities dealers. The appellants do not challenge the cease and desist order in these proceedings as it applies to the "Double Your Money" program. Further, Greater Ministries voluntarily discontinued the "Double Your Blessings" program prior to the entry of the order on appeal. These programs were replaced by the "Faith Promises" program.

In developing the "Faith Promises" program, the pledge agreement was revised to delete the schedule of repayments and is replete with disclaimers that the pledge is a gift for which the donor expects nothing in return other than what God might bestow upon him as promised in the scriptures of the New Testament. In this respect, the pledge agreement contains the following:

I accept the teachings of Jesus Christ in Luke 6:38 and believe that God will prosper His Church and I am acting in faith that I will receive in the manner and spirit I am giving.

Luke 6:38 (King James) states, "Give, and it shall be given unto you; good measure, pressed down, and shaken together, and running over, shall men give into your bosom. For with the same measure that ye mete [give] withal it shall be measured to you again."

The appellee brought this action to enforce the cease and desist order in regard to the "Faith Promises" program. The appellants argue that the cease and desist order did not specifically mention, and therefore does not apply to, the "Faith Promises" program. Although not recited in the order under appeal, the transcript reflects that the trial court orally pronounced "that the Double Your Money or Double Your Blessings or Faith Promises are functionally indistinguishable." The injunction, therefore, is directed to all three of the programs.

The appellants have raised a number of constitutional arguments relating to the relationship between church and state. However, we do not reach these issues because this case turns on the issue of whether the "Faith Promises" pledge agreement constitutes a "security" under Florida law.

The sale of securities in Florida is regulated by chapter 517, Florida Statutes (securities transactions). No security, unless exempt, may be sold unless it is registered pursuant to the terms of this chapter. §§ 517.07; 517.081, Fla. Stat. (1995). No person may sell securities unless registered with the Department of Banking and Finance. § 517.12, Fla. State (1995). Securities are defined in

section 517.021(17), Florida Statutes (1995). It is undisputed that the pledge agreements are not registered and that the Paynes are not registered dealers. Although the pledge agreements at issue are not specifically identified as securities in section 517.021(17), Florida Statutes (1995), they could be considered to be "an evidence of indebtedness" under section 517.021(17)(f); "an investment contract" under section 517.021(17)(g); or "Any other instrument commonly known as a security, including an interim or temporary bond, debenture, note, or certificate" under section 517.021(17)(u). Clearly, the pledge agreements of the "Double Your Money" and "Double Your Blessings" programs fall within one of these categories and are not registered. To the extent that the sale of these securities is enjoined, the trial courts order is affirmed.

To determine the character of the "Faith Promises" agreement, it is necessary to look beyond chapter 517 to a broader definition of a security as found in case law. The most widely-accepted definition of a security is found in *Securities & Exchange Comm'n v. W.J. Howey Co.,* 328 U.S. 293, 66 S.Ct. 1100, 90 L. Ed. 1244 (1946). There, the court set forth the following factors to determine whether an investment is a security: (1) an investment of money, (2) common enterprise, and (3) an expectation of profits to be derived soley from the efforts of another. 328 U.S. at 298-99, 66 S. Ct. at 1103. This court has adopted the Howey criteria. See *Farag v. National Databank Subscriptions, Inc.* 448 So. 2d 1098 (Fla. 2d DCA 1984); *Adams v. State*, 443 So. 2d 1003 (Fla. 2d DCA 1983), review denied, 449 So. 2d 265 (Fla. 1984). In applying these criteria to the "Faith Promises" pledge agreement, we determine that it

is not a security.* The offending schedule of repayment found in the preceding two programs has been deleted. In this document, Greater Ministries makes no promise, express or implied, that it will make any payment to the donor. The "Faith Promises" agreement shifts any supposed "expectation of profits" from Greater Ministries to a supreme deity. We, therefore, reverse the temporary injunction as it applies to the "Faith Promises" pledge agreement and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

DAHAY, A.C.J., and ALTENBERND, J., Concur.

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* The manner in which the "Faith Promises" program is promoted may nonetheless be subject to scrutiny pursuant to the Deceptive Unfair Trade Practices Act, section 501.203(1), Florida Statues (1995). See *State, Dep't of Legal Affairs v. Jackson*, 570 So. 2d 864 (Fla. 3d DCA 1991).

APPENDIX E

The Document

Date _____

Dear Ones:

It is my desire to give a donation to the Greater Ministries International Church at 715 East Bird Street Suite 402, in Tampa, Florida 33604.

As a person donating into the Ministry of the Lord Jesus Christ, I realize that there are no guarantees implied and the only promise involved is the promise that God gives us in His Word.

It is my belief that Luke 6:38 teaches, "Give, and it shall be given unto you; good measure, pressed down and shaken together, and running over, shall men give into your bosom. For with the the same measure that ye mete (give) withal it shall be measured to you again."

I accept the teachings of Jesus Christ in Luke 6:38 and believe that God will prosper His Church and I am acting in faith that I will receive in the manner and spirit I am giving.

I believe the donation I am giving will be used in the ministry to do the works the original church was designed to do. I believe the Lord's promises are in force in this ministry and He is able to keep His promises.

My total donation of $_____ is given freely and is to be divided into amounts of:

☐ $ 250
☐ $ 500
☐ $1,000
☐ $2,000
☐ $3,000

Each for a total of $_____, to be used as God leads.

☐ $4,000
☐ $5,000 This is my first donation Yes☐ No☐

Company Name

Name (First) _____ (Initial) ____(Last) _____

Address _____

City _____State _____Zip _____

Signature _____Phone (___) _____

Comments _____

Office Use Only

☐Cash ☐Cashier's Check

DATE RECEIVED / / ☐Money Order

Comments _____

Greater Ministries' Gifting Program is not an investment program. It is not a stock, bond nor security. It makes no guarantees of any kind, implied or expressed. The only promises that exist are made by the Lord Jesus Himself in Luke 6:38. Matthew 25:14-29 is the biblical teaching of the doubling of one's talents.

_____

FILED
OCT 26 2005
OFFICE OF THE CLERK

No. 04-1576

In The

Supreme Court of the United States

DAVID WHITFIELD,

Petitioner,

vs.

ALABAMA SECURITIES COMMISSION
and OHIO DIVISION OF SECURITIES,

Respondents.

**On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The Eleventh Circuit**

PETITION FOR REHEARING

DAVID WHITFIELD
P.O. Box 1031
Coleman, FL 33521-1031

Petitioner

QUESTION PRESENTED

1. Whether the State Agency plaintiffs lacked standing in bringing suit on behalf of its citizens under *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), where the securities case was based solely on federal question?

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PETITION FOR REHEARING

The Petitioner, DAVID WHITFIELD ("Mr. Whitfield") petitions this Court for a rehearing in this case following the final decision rendered on October 3, 2005, pursuant to S.Ct. Rule 44. The instant petition is timely filed and within the time limitations period set forth in S.Ct. Rule 44. This case presents a question of exceptional importance involving constitutional issues.

REASONS FOR GRANTING PETITION FOR REHEARING

Mr. Whitfield seeks a rehearing on only one of the three questions presented in this final appeal – a question dealing head-on with the issue of a state regulatory agency having Article III standing in a federal securities action where the state's citizens, not the state, sustained an injury – the question of standing by a state and its regulatory agencies which has been found to be lacking by this Court as well as federal appellate courts over the years. While the appellate court below recognized the issue of standing was properly raised below, the court nevertheless chose to merely note such a claim was frivolous under the facts of the case. Moreover, the appellate court did not address the Article III, section 2, clause 1 controversy/violation of the Constitution.

The question presented here is simply one of law; *Whether the Alabama Securities Commission and Ohio Division of Securities lacked Article III standing in bringing a federal securities action on behalf of their citizens where the securities case was based solely on federal question?* Mr. Whitfield respectfully submits that the

answer to this standing question must be answered in the affirmative; that is, the state agencies lacked standing to bring a federal securities suit solely into federal court on behalf of their respective citizens. This question is of exceptional importance as this Court has always supported the standing requirements of Article III in bringing forth a civil action. By allowing the Eleventh Circuit's decision that a state had standing in the instant case stand would set new precedent of law in the federal court as it relates to the federal statutes and SEC regulations.

In the case sub judice, the facts are not in dispute, rather, the trial record clearly reflects that the Alabama Securities Commission and Ohio Division of Securities ("State Agency Plaintiffs") filed a federal complaint citing violations of federal securities laws codified under Title 15 U.S.C. §§ 77 and 78. The State Agency Plaintiffs claimed the district court had subject matter jurisdiction to hear suit on the federal question, and specifically sought relief on behalf of their respective citizens who were the real parties-in-interest. State Agency Plaintiffs claimed below as well as in front of the trial court that State Agency Plaintiffs had standing under the doctrine of *parens patriae*. However, such a legal contention conflicts with many of the decisions of this Court as well as other federal circuit courts. *See, Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603-04, 102 S.Ct. 3260, 3266-67 (1982). When a state sues in *parens patriae* to enforce a federal statute, Congress clearly intended the states be able to bring actions in that capacity. *See, Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-66, 92 S.Ct. 885, 890-93 (1972). Under the federal securities statute, no such intention can be derived from a plain reading of Title 15 U.S.C. §§ 77 and 78. Nothing in this statutory provision

suggests that a state may bring lawsuits on behalf of its citizens to enforce securities laws. In fact, the plain language of the statute supports the conclusion that Congress had no such intention. *See, Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917 (1975) ("plaintiffs were not entitled to sue for violation of Rule 10b-5, since they neither purchased nor sold any of the offered shares").

This Court recently addressed the question of standing under a completely different set of facts. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. ___, 124 S.Ct. ___, 159 L.Ed.2d 98 (2004). In *Newdow*, this Court explained:

> Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall with the zone of interests protected by the law invoked." *Newdow*, 542 at ___, 159 L.Ed.2d at 109 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315 (1984)). This Court further noted that "'[t]here are good and sufficient reasons for th[e] prudential limitation on standing when rights of third parties are implicated – the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurances that the most effective advocate of the rights at issue is present to champion them.'"

Id. (quoting *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80, 98 S.Ct. 2620 (1978)). The State Agency Plaintiffs did not claim in their federal

securities complaint any injury, but, rather claimed that the alleged injuries sustained by their citizens provided the necessary standing to bring the lawsuit on behalf of their citizens given that State Agency Plaintiffs were responsible for protecting and recovering any injuries sustained by their citizens as a result of the alleged wrongdoing committed by Mr. Whitfield.

This Court has held on many occasions that it is obligated as a matter of the "case or controversy" requirement associated with Article III of the Constitution, in reviewing a decision of a federal district court, to examine the standing of the parties even if the issue of standing was not raised by the parties themselves. *See, Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211 (1977); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110, 122 S.Ct. 511 (2001) ("We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below."); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 95, 118 S.Ct. 1003 (1998) ("'[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it'"). A litigant who meets the Article III standing requirements must also meet the further requirement of asserting only his own legal interests rather than those of third parties in general. *Warth v. Sedin*, 422 U.S. 490, 95 S.Ct. 2197 (1975); *see also, Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 (1992) (At an "irreducible constitutional minimum," Article III standing requires that the plaintiff "must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not

conjectural or hypothetical."). With respect to the question of *representational* standing, that is, organizations seeking to represent their constituents in the challenge of particular conduct as violative of federal law, this Court has expressed the view that representatives are not exempt from the Article III requirement of injury in fact, as they must establish that they themselves suffered that requisite injury or that those whom they purport to represent did so. *Valley Forge Christian College v. Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 102 S.Ct. 752 (1982). If none of the named parties purporting to represent a class in a federal court action establishes the requisite under Article III of a case or controversy with the defendant, none may seek on behalf of himself or any other member of the class. *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974). This Court has refused to allow states to institute judicial proceedings to protect citizens of the United States who are also its citizens from the operation of statutes of the United States. *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597 (1923). It is beyond peradventure that the State Agency Plaintiffs alleged that Mr. Whitfield and others sold "securities" under the guise of the Church's gifting program – a program which the State Agency Plaintiffs alleged that Mr. Whitfield, together with others, promised a return of double the gift (or as characterized by the State Agency Plaintiffs as an "investment"). Under the express holding by this Court in *Blue Chip Stamps*, it should be axiomatic that the State Agency Plaintiffs, having suffered or otherwise sustained no injury to themselves, clearly lacked standing to bring a federal securities action on behalf of their citizens – the actual injured parties. For these very reasons, this Court should conclude, as it did in *Blue Chip Stamps, supra*, that the State Agency Plaintiffs here lacked standing to proceed

in *parens patriae* and bring the federal securities action on behalf of their injured citizens, or so Mr. Whitfield respectfully opines.

CONCLUSION

For the foregoing reasons, the instant Petition for Rehearing should be granted, the judgment of the Eleventh Circuit should be vacated, and the case remanded with instructions to dismiss same.

Respectfully submitted,

DAVID WHITFIELD
P.O. Box 1031
Coleman, FL 33521-1031

Petitioner

CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay.

DAVID WHITFIELD